IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1054

JEFF TRACHTMAN, individually and by his father GILBERT M. TRACHTMAN,

Petitioners,

-against-

IRVING ANKER, individually and in his capacity as Chancellor of New York City Public Schools, SANFORD GELERNTER, individually and as Administrator of Student Affairs, Office of High Schools, Board of Education of the City of New York, GASPAR FABRICANTE, individually and as Principal of Stuyvesant High School, and JAMES REGAN, ISAIAH ROBINSON, STEPHAN AIELLO, AMELIA ASHE, JOSEPH BARKAN and ROBERT CHRISTEN, constituting the Board of Education of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Questions Presented

1. Is this matter a live case or controversy so as to confer jurisdiction under Article III of the United States Constitution?

2. Was the decision below correct under the unique circumstances of this case?

Statement of the Case

Sometime in 1975, petitioner* and a fellow student at Stuyvesant High School prepared the sex survey questionnaire which is appended to the petition for certiorari at pages 56a-59a and submitted it to the principal of the school for approval.** Principal Fabricante did not give his approval and the survey was submitted to the Office of Student Affairs. Based upon respondents' policy requiring parental consent for student participation in research projects, Student Affairs Administrator Gelernter denied

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*Although the caption indicates plural petitioners, as used herein, "petitioner" refers only to the student Jeff Trachtman.

**The survey was originally intended to consist of an oral interview, but was changed to a written questionnaire in the course of the administrative appeal.

permission to distribute the questionnaire by letter dated December 17, 1975. Petitioner appealed his decision to higher administrative authorities and obtained a final denial of permission by resolution of the Board of Education on February 24, 1976. The instant litigation was commenced by service of a summons and complaint on August 26, 1976, alleging a violation of petitioner's First Amendment rights pursuant to 42 U.S.C. §1983.

The merits of the case were determined by the District Court for the Southern District of New York (MOTLEY, J.), upon the affidavits of experts in the fields of psychology and psychiatry submitted on behalf of both sides. The substance of these affidavits, and additional relevant facts, are adequately set forth in the opinion of Judge LUMBARD

and will not be repeated (2a-15a).*

Judge MOTLEY found that the risk of psychological harm to children of thirteen and fourteen years of age was sufficiently substantial to justify prohibiting the distribution of the questionnaire to this group, but that the petitioner's First Amendment rights were violated by prohibiting distribution to upper class students (38). Judge MOTLEY directed the parties to devise a suitable plan for distributing the questionnaire in such a way so as to conform to the "safeguards requested by the school authorities" (49a-50a).

Both sides appealed portions of the decision of the District Court. The appeal to the Second Circuit Court of Appeals was

*Numbers in parentheses refer to pages of the Petition For Certiorari unless otherwise noted.

argued March 31, 1977 and decided August 31, 1977. In the interim, petitioner graduated from Stuyvesant High School and is no longer a student in the New York City Public School System. In a footnote, the Circuit Court indicated that it did not believe petitioner's graduation rendered the case moot, finding that the litigation had been brought by petitioner acting in a representational capacity (2a-3a).

Citing to its own application of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), in the case of Eisner v. Stamford Board of Education, 440 F. 2d 803, 810 (2d Cir., 1971), the Circuit Court ruled: "[I]n order to justify restraints on secondary school publications, which are to be distributed within the confines of school

property, school officials must bear the burden of demonstrating 'a reasonable basis for interference with student speech'" (9a). In evaluating the evidence presented at the trial level, the Court stated: "The inquiry of the district court should have been limited to determining whether defendants had demonstrated a substantial basis for their conclusion that distribution of the questionnaire would result in significant harm to some Stuyvesant students" (13a). The Circuit Court concluded that the evidence of significant harm was sufficient, not only as to ninth and tenth-grade students, as the District Court had found, but also with respect to eleventh and twelfth-grade students (14a). Noting that the prohibition against distribution of the questionnaire was not intended to curtail the petitioner's First Amendment

rights, but "is principally a measure to protect the students committed to their care, who are compelled by law to attend the school, from peer contacts and pressures which may result in emotional disturbance to some of those students whose responses are sought," the Court held (15a):

> "The First Amendment right to express one's views does not include the right to importune others to respond to questions when there is reason to believe that such importuning may result in harmful consequences."

Judge GURFEIN, concurring in Judge LUMBARD's majority opinion, emphasized that the decision of the Circuit Court was premised on the fact that the case at bar does not involve "distribution of sexual material in school", which is protected by the First Amendment, but, rather "involves individual responses to various aspects of

sex from the point of view of personal history" (16a). Judge GURFEIN also applied a rule set forth in Tinker v. Des Moines School District, supra, 393 U.S. 503, 513 (16a):

> "'Invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech'."

Judge MANSFIELD dissented, finding that respondents had not met their burden of demonstrating a reasonable basis for their decision which, in Judge MANSFIELD's opinion, did abridge petitioner's First Amendment rights (17a). Judge MANSFIELD's conclusions were based upon his evaluation of the expert opinion offered on each side. He found the affidavit opinions relied upon by the majority to be "conclusory and factually unsupported" (20a), and "flatly controverted by five eminently well-qualified experts" (22a), including petitioner's father, whose

credentials Judge MANSFIELD found superior to those of respondents' experts (29a).

POINT I

THE COURT DOES NOT HAVE JURISDICTION TO DECIDE THIS CASE BECAUSE IT HAS BEEN RENDERED MOOT BY PETITIONER'S GRADUATION.

In Board of School Commissioners of Indianapolis v. Jacobs, 420 U.S. 128 (1975), a case factually analogous to that at bar, this Court declined to review the merits of the lower courts' debisions, finding that the graduation of the six named plaintiffs rendered the case moot. Like petitioner herein, the Indianapolis plaintiffs were high school students and members of their school newspaper who had challenged the school board's rules and regulations as violative of their First Amendment rights. Although the Indianapolis complaint stated that the litigation

was intended to be brought as a class action, the District Court had never so certified. This Court ruled that the failure to identify and obtain certification of an appropriate class in conformity with the procedural requirements of F.R.C.P. 23 was fatal to jurisdiction of a viable case or controversy. Respondents submit that this Court's ruling in Board of School Commissioners of Indianapolis v. Jacobs is determinative of the instant petition.

The Circuit Court's footnote dicta indicating that that Court believed the case not to be moot because petitioner was acting "in a representational capacity as editor-in-chief of 'the Stuyvesant Voice'" (3a) is not legally accurate. While the complaint states that the student Jeff Trachtman was at that time editor-in-chief of "The Stuyvesant Voice" (Appendix, p. 31),

class status was neither sought nor obtained. Moreover, no student who wished to respond to such questionnaire was made a party. Since plaintiff did not affirm his own intention to respond to the questionnaire, he cannot be said to represent the class of intended distributees or student respondents. Warth v. Seldin, 422 U.S. 490, 499 (1975); Richardson v. Ramirez, 418 U.S. 24, 39 (1974). The only right plaintiff ever had standing to assert was that First Amendment right personal to himself as a student and member of the school newspaper to publish his own perceptions and ideas. As he is no longer in either position, he cannot benefit from the outcome of this appeal, and the case is moot.

The cases cited in the opinion of the Court below in support of its finding against mootness are all distinguishable from this

case. In Richardson v. Ramirez, supra, 418 U.S. 24, 39, plaintiffs had been accorded class status pursuant to California rules of procedure which, the Court noted, would probably not have been granted if the action had originated in the federal system, but which the Court found to be controlling in that case. The controversy involved the constitutionality of a California statute which had been applied to permanently disenfranchise convicted felons who had served their sentences and parole. Although the original three respondent county clerks had agreed, while the litigation was pending, to alter their policies, a fourth county clerk had been added as a party defendant and had not joined in the agreement to change the suspect policy. Thus, there was clearly present a live case and controversy between the identified adverse

parties in Richardson.

Similarly, in Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976), although the individually named plaintiff could no longer benefit from a favorable decision due to changed circumstances, his suit had been certified as a class action. This Court found that certification of a class conferred legal status upon the unnamed members of the class which kept the controversy alive and prevented mootness. That case is not applicable to the case at bar since petitioner was never certified to represent a class.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), is completely inapposite to the instant case. Unlike Trachtman, who is an individual asserting First Amendment rights personal

to himself, the Washington State Advertising Commission was a state agency, comparable to a trade association, elected by apple farmers of that state to promote and protect the commercial interests of its constituency. The issue was not mootness, but standing to bring the suit alleging that North Carolina's regulation of apple grades on containers shipped into that state imposed an unconstitutional burden on interstate commerce. This Court found that the plaintiff agency met the requirements already established in Warth v. Seldin, supra, 422 U.S. 490 for representational standing as a trade association. Of particular interest in that case was the consideration given to the requirement that, in a representational suit, neither the claim, nor the relief should require the participation of the individuals

represented (432 U.S. at 343). Such a requirement could certainly not be met in the case at bar since all aspects of the relief requested, i.e., the distribution of the questionnaire, the compilation of the responses, and the writing of the proposed newspaper article, would necessarily have to be performed by individual members of the alleged "class", which no longer includes the plaintiff.

In DeFunis v. Odegaard, 416 U.S. 312 (1974), this Court found that the fact that a resolution of the issues presented on appeal would not affect the plaintiff student who would be permitted to complete his final term of law studies and receive a diploma regardless of the outcome of the appeal, deprived the Court of jurisdiction to consider

the merits of the case pursuant to Article III of the Constitution. This Court held: "It matters not that these circumstances partially stem from a policy decision on the part of the respondent Law School authorities" (416 U.S. at 317).

It is possible, if not probable, that an issue similar in some respects to that bar may arise again in the future. However, given the truly unique character of the proposed questionnaire, and the context in which it is proposed to be presented, it is unlikely that all of the elements of this controversy will again combine in exactly the same manner so that the instant case could be found to be sufficiently "capable of repetition" to overcome the jurisdictional defect created by mootness.

See SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972); Williams v. Alioto, 549 F. 2d 136, 142 (9th Cir., 1977). Moreover, it is apparent from the sequence of events herein that, had this matter been diligently litigated from the start, it would have been possible to bring this matter before this tribunal before it became moot. The issue is not, therefore, evasive of review.

POINT II

THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS CORRECT AND APPROPRIATE IN THE UNIQUE CIRCUMSTANCES OF THIS CASE.

This Court very recently acknowledged that "laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether." Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977). See Tinker v. Des Moines School District, supra, 393 U.S. 503, 513. It has been further recognized that First Amendment rights must be evaluated on a case by case basis, giving full consideration to such facts as the age and maturity of those to whom the proposed communication is addressed. Healy v. James, 408 U.S. 169, 180 (1972); Quarterman v. Byrd, 453 F. 2d 54, 57

(4th Cir., 1971). The facts of this case clearly support the decision of the Second Circuit Court of Appeals that the time, place and manner of the proposed "speech" justified prohibiting the distribution of the questionnaire, and that the First Amendment was not violated.

It is undisputed that Stuyvesant High School provides extensive instruction in matters of sex and, in addition, provides students with a forum within the school curriculum where they can discuss such matters freely among their peers.* It is clear,

*Petitioner's "less restrictive means" argument (12-13) could, in fact, easily be turned around in favor of respondents. Not only were means less destructive of the student psyche already available at Stuyvesant, i.e., the student rap sessions, from which petitioner might have gleaned the information for his story, but, such sessions presented petitioner with a forum for his own thoughts and ideas among students who had already

(Footnote cont'd. on next page)

therefore, that it was not the substance of the proposed message which was sought to be regulated or suppressed by respondents. Cf., Linmark Associates, Inc. v. Township of Willingboro, supra, 431 U.S. at 94. This fact distinguishes the case at bar from Tinker v. Des Moines School District, supra, and the other cases cited by petitioner (6).

Contrary to petitioner's assertions (8-10), it was not the message petitioner

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* (Footnote cont'd. from previous page)

voluntarily expressed an interest in the subject-matter by attending the sessions. In addition, petitioner had the alternative of restructuring his questionnaire to provide the safeguards required by school authorities. Surely, the respondents do not have the obligation of reviewing proposals like that submitted by the petitioner with undefined and infinite possibilities for modification in mind. It is doubtful that permission conditioned upon specified modifications would have been acceptable to petitioner in any event, notwithstanding Judge Motley's directions.

sought to convey which was found to be emotionally or psychologically hazardous to students at Stuyvesant, but petitioner's solicitation of the most intimate thoughts and experiences of his fellow students with the intent to compare them publicly with those of other students that caused respondents to suppress the questionnaire. Regardless of the alleged "voluntary" nature of the questionnaire, the vulnerability of the average adolescent to peer pressure is well known and it is extremely unlikely that the recipient of such a questionnaire could decline to respond without being exposed to ridicule and possible emotional trauma. It was, therefore, not the message, but the manner in which it was to be presented that prompted respondents to deny permission to distribute the questionnaire.

Petitioner's statement that the majority opinions below "suggest that a report of the information obtained by the survey could also be prohibited" (7) is not supported by the facts. Both Judge LUMBARD and Judge GURFEIN limited their findings to the distribution of the survey and carefully distinguished the dissemination of information aspect of the case (3a; 8a, n.2; 13a; 16a).

However, although the publication of an informational article was not prohibited, the representation to the student community that the proposed article was to be based upon "scientific" research did play a significant part in the decision of the administrative authorities. The Board of Education reasoned that rules applicable to scientific research in the public schools generally should govern the type of survey proposed by petitioner (Appendix, p. 60). It was

petitioner's failure to provide professional research controls and obtain the informed consent of both students and parents that precipitated the conflict. The value and accuracy of any sociological analysis necessarily depends upon the reliability of the research techniques employed. It was feared that the ad hoc research technique proposed by petitioner would result in highly inaccurate and misleading conclusions which, when presented in the context of a school newspaper article published with the express consent of school officials, would be accepted uncritically by the student readers as truth. Thus, the place in which the proposed communication was to occur was considered to be significant in determining whether petitioner's First Amendment rights were unconstitutionally impaired.

The Court below correctly relied upon Ginsberg v. New York, 390 U.S. 629 (1968) and Prince v. Massachusetts, 321 U.S. 158 (1944) (8a), in finding that the respondents had reasonably performed their duty to protect the children in their charge from unnecessary psychological harm which might result from distribution of the questionnaire. The decision of the Second Circuit is completely consistent with the teachings of Tinker v. Des Moines School District, supra, 393 U.S. 503, 508, in which this Court noted that students other than those wishing to express their own opinions have the right "to be secure and to be let alone." It is this right which respondents sought to protect in prohibiting petitioner's survey.

In weighing the rights of petitioner against those of the student body generally, respondents contend that the correct decision

was made. Respondents submit that the expert opinion presented in support of their decision was more than sufficient to establish the reasonableness of their conclusions. The nearly unanimous opinion of the experts on both sides was that emotional harm to at least some students would probably result from exposure to the questionnaire. It was not determined, nor would it be possible to predict, exactly how many students would be so affected. The opinions of the experts diverged, however, primarily upon the relative value of such traumatic confrontation. Petitioner's witnesses apparently believed that such trauma might be beneficial and would have a cathartic effect upon those who were experiencing emotional difficulty regarding matters of sex. Respondents, relying upon the more moderate advice of

their own experts, determined to proceed more cautiously. Their decision conformed in every respect to the standards laid down by this Court for the proper administration of public schools in a manner that protects the welfare and rights of all without unreasonably restricting the rights of the individual student. Tinker v. Des Moines Independent School District, supra, 393 U.S. 503, 507, 511-513. Cf., Ingraham v. Wright,430 U.S. 651, 681-82 (1977). When a good faith decision is made based upon a rational evaluation of all of the facts, the courts should not intervene in the day to day management of public schools. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). A difference of opinion among experts does not render the professional judgment of school authorities unreasonable or violative of petitioner's constitutional rights.

Finally, petitioner has raised the argument that the procedure required for prior restraint of constitutionally protected materials was not followed (12). The Circuit Court correctly noted in a footnote (8a, n.3):

> "Plaintiffs do not challenge the procedure by which the Board's decision was reached and this case does not involve any administrative regulation placing a per se ban on all student surveys."

The procedural issue was not litigated below and the record does not indicate that approval of the proposed survey was originally sought in compliance with any particular rule established by respondents. The only rules relied upon by respondents are those applicable to researchers, which were not followed by petitioner. The question of the efficiency of respondents' review procedure

is not properly before this Court for review.

CONCLUSION

The petition for certiorari should be denied.

February 22, 1978

Respectfully submitted,

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